Filed 7/25/19 Kilmon v. Superior Court CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MIREYA KILMON, Plaintiff and Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; HAL HAYS CONSTRUCTION, INC. AND ALLIED ENVIRONMENTAL, INC., Real Parties in Interest.	A156854 (Alameda County Super. Ct. No. RGI3678987)

Plaintiff and petitioner Mireya Kilmon (plaintiff) seeks a writ of mandate directing respondent Alameda County Superior Court to vacate its orders granting summary adjudication of her wrongful death causes of action against defendants and real parties in interest Hal Hays Construction (Hal Hayes) and Allied Environmental, Inc. (Allied) (collectively, defendants).

Plaintiff is the surviving wife of decedent Stephen Kilmon (decedent). Plaintiff alleges that defendants' conduct resulted in grievous injuries to decedent (the 2010 accident). As defendants failed to demonstrate that a reasonable jury could not find that the accident was a substantial cause of the decedent developing a "mental condition which resulted in an uncontrollable impulse to commit suicide," we grant the petition and order a writ of mandate to issue directing the trial court to set aside its order granting

summary adjudication of the plaintiff's first cause of action for premises liability (wrongful death) and second cause of action for general negligence (wrongful death). (*Grant v. F.P. Lathrop Const. Co*. (1978) 81 Cal.App.3d 790, 797–798.)

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff makes the following allegations. On June 3, 2010, decedent was working at his desk in the construction office of the United States Army Corps of Engineers' Bay Model Building. The accident was caused by defendants' employees dropping a HEPA vacuum through the ceiling above decedent and striking him. Decedent suffered a neck injury and concussion, and was later diagnosed with subligamentous disk protrusion/herniation at C5-6 with a tear to the posterior ends, complex regional pain syndrome, breathing issues, and seizure activity (the 2010 injuries). Decedent underwent multiple hospitalizations, epidural injections, and nerve injections to relieve pain and he ultimately required the implantation of a spinal cord stimulator in his back.

On June 1, 2012, decedent and plaintiff filed their original complaint against defendants for personal injuries and loss of consortium. While the litigation was ongoing, in August 2015, decedent committed suicide by an overdose of pain pills. After decedent's death, plaintiff was appointed successor in interest to his estate and filed a first amended complaint (FAC) that maintained the original causes of action for premises liability, general negligence, and loss of consortium and added two wrongful death causes of action (premises liability and general negligence).

In February 2019, defendants brought a motion for summary judgment or, in the alternative, summary adjudication. The trial court granted summary adjudication as to plaintiff's wrongful death causes of action and denied summary adjudication as to the remaining causes of action. Plaintiff claims that the trial court erred in granting summary adjudication because the defense pathologist's opinion was inadmissible and no other evidence established as a matter of law that the 2010 accident did not cause decedent's mental condition that resulted in his suicide. Plaintiff further claims that the trial court erred in ruling that plaintiff failed to raise a triable issue of material fact regarding

causation as, contrary to the trial court's ruling, the opinion of plaintiff's expert was admissible under *People v. Sanchez* (2016) 63 Cal.4th 665.

DISCUSSION

I. Summary Judgment Law and the Standard of Review

Code of Civil Procedure section 437c, subdivision (c), provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant moving for summary judgment bears the initial burden of showing that a cause of action "has no merit" because one or more of its elements "cannot be separately established" or is subject to an affirmative defense. (Code Civ. Proc. § 437c, subds. (p)(2), (o)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar*, *supra*, 25 Cal.4th 826 at p. 850.) In California, summary judgment law "continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854.) To meet this significant burden, the moving party must support the summary judgment motion "with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' [Citation.]" (*Id.* at p. 843.) Only once a defendant meets this burden does it shift to plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc. § 437c, subd. (o); *Aguilar, supra,* 25 Cal.4th 826 at p. 850; see also *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, 268 (*Overton*) ["As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact."])

On appeal, we review orders granting or denying a summary judgment motion de novo. (*Aguilar*, *supra*, 25 Cal.4th 826 at p. 860.) "We exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.]" (*Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 303.) We must " 'view the evidence in the light most favorable to plaintiff[] as the losing part[y]' and 'liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' " (*McDonald v. Antelope Valley Community College Dist*. (2008) 45 Cal.4th 88, 96–97.)

Courts generally review evidentiary rulings on summary judgment for abuse of discretion. (See *Mackey v. Bd. of Trustees of CSU* (2019) 31 Cal.App.5th 640, 657 (*Mackey*) [" '[t]he weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard.' "]) Under an abuse of discretion standard, "[t]he party challenging an evidentiary ruling bears the burden of establishing the court exceeded the bounds of reason." (*Ibid*.) However, there is some question as to whether a de novo standard should apply to evidentiary rulings made solely on summary judgment papers. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 (*Reid*) [recognizing question but declining to address it]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255, fn.4 ["[w]hether abuse of discretion is the proper standard of review when rulings on evidentiary objections are based on papers alone presents an interesting question, one that is by no means settled"].) Regardless of the standard of review, evidentiary questions at summary judgment " ' "are subject to the overarching principle that the proponent's submissions are scrutinized strictly, while the opponent's are viewed liberally." ' [Citation]." (*Mackey*, *supra*, 31 Cal.App.5th at p. 657.)

As the trial court in this case abused its discretion in making the evidentiary rulings discussed below, the application of either a de novo or abuse of discretion standard does not alter the outcome. We proceed under the abuse of discretion standard.

II. Defendants Did Not Meet Their Burden to Demonstrate that Plaintiff Cannot Establish the Element of Causation on Her Wrongful Death Claims

As the moving party, defendants had the burden to demonstrate that plaintiff's wrongful death causes of action are without merit because one or more of the elements of the causes of action cannot be established or are subject to an affirmative defense. (*Aguilar, supra*, 25 Cal.4th at p. 843; see also *Mackey, supra*, 31 Cal.App.4th at p. 775 [although at trial the burden of proof ultimately rests with the plaintiff, " ' "the burden is reversed in the case of a summary issue adjudication or summary judgment motion." ' [Citation]"].) Both negligence-based and premises-based wrongful death actions require proof that the defendant's wrongdoing was a proximate cause of the harm. (See *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) " 'The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion.' " (See *Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 33.)

The trial court granted summary adjudication on plaintiff's two wrongful death causes of action in her FAC - wrongful death (premises liability) and wrongful death (general negligence) - on the grounds that defendants "presented sufficient evidence to make a prima facie showing that no triable issues of material fact exist regarding the lack of a causal link between its alleged negligence and [decedent's] death." Defendants' sole argument as to plaintiff's wrongful death claims was focused on the element of causation: that they established a lack of competent proximate cause evidence between the 2010 accident and decedent's death, arguing that "the element of causation is missing and cannot be established, such that summary judgment . . . is necessary and appropriate as a matter of law."

Viewing the evidence, as we must, in the light most favorable to plaintiff, we agree with Allied that this case presents "complex causation" issues and find that defendants did not present cognizable evidence negating the element of causation. (See *Overton*, *supra*, 136 Cal.App.4th at p. 268 [as to each claim considered on a motion for summary judgment, " 'the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact' "].) Therefore, the order granting summary adjudication must be reversed. (See *Mackey*, *supra*, 31 Cal.App.5th at p. 781 [summary judgment reversed where defendants failed to show a lack of triable issue on whether plaintiffs suffered adverse action because they "did not establish that no reasonable jury could find" for the plaintiffs on this element].)

A. Causation Can be Established by a Wrongful Act that Caused a Mental Condition Proximately Resulting in an Uncontrollable Impulse to Commit Suicide

Under California law, suicide following a wrongful act that causes a mental condition proximately resulting in an uncontrollable impulse to commit suicide is actionable. (*Grant v. F.P. Lathrop Const. Co*. (1978) 81 Cal.App.3d 790, 797–798 (*Grant*); see also *Tate v. Canonica* (1960) 180 Cal.App.2d 898 (*Tate*); *Burnight v. Industrial Acc. Com* (1960) 181 Cal.App.2d 816.) In *Tate*, the court noted that suicide had historically been viewed as an intervening act that broke the chain of causation, thereby precluding liability for another party's negligence as a cause of the suicide. (*Tate*, *supra*, 180 Cal.App.2d at pp. 901–903.) The *Tate* court adopted an exception to this general rule: "if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide, then the wrongdoer may be held liable for the death." (*Id*. at p. 915.) It would "not make any difference that the decedent 'knew what he was doing.' If defendant is to avoid liability, the decedent's act must be voluntary, not in that sense but in the sense that he could, in spite of his mental illness, have decided against suicide and refrained from killing himself." (*Ibid*.)

In *Grant*, the decedent, a journeyman roofer, fell off of a roof after stepping on a slippery material on the roof's surface. (*Grant*, *supra*, 81 Cal.App.3d at p. 795.) As a result, he became a permanent paraplegic and, about 17 months after the accident, committed suicide by ingesting a lethal amount of barbiturates. (*Ibid.*) Citing the causation reasoning in *Tate*, the court held that the following instruction on causation in relation to suicide was a correct statement of the law: " 'if the negligent wrong causes a mental condition which results in an uncontrollable impulse to commit suicide, then the defendant may be held liable for the death.' " (*Id.* at 795–796.)

The two wrongful death causes of action in the FAC (premises liability and general negligence) clearly put at issue whether decedent "committed suicide on August 15, 2015, as a direct and proximate result of the negligence and resulting injuries sustained by decedent . . . on June 3, 2010." Under the standard set forth in *Grant*, defendants therefore had to demonstrate that no reasonable jury could find that defendants' wrongdoing, the 2010 accident, was the proximate cause of decedent's death by virtue of it "causing a mental condition which result[ed] in an uncontrollable impulse to commit suicide." (*Grant*, *supra*, 81 Cal.App.3d at p. 798; see *Mackey*, *supra*, 31 Cal.App.4th at p. 785.) Only then would the burden shift to plaintiff to demonstrate a prima facie showing of the existence of a triable issue of fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Defendants contend that they negated the alleged proximate cause between the 2010 accident and decedent's 2015 suicide with the following evidence: (1) the opinion of defense expert, Dr. Joseph Cohen, that decedent's death was the result of suicide and not the result of the 2010 accident; and (2) the testimony of decedent's treating neuropsychologist Dr. Maxine Sadhai. As explained below, defendants are incorrect.

B. Dr. Cohen's Declaration Cannot Shift the Burden to Plaintiff

Defendants submit the declaration of Dr. Cohen as one of their "two salient pieces of evidence" offered to shift the burden to the plaintiff on the element of causation.

Dr. Cohen's declaration states that he is a physician and forensic pathologist who is certified by the American Board of Pathology in Anatomic and Clinical Pathology,

Clinical Pathology, and Forensic Pathology. Dr. Cohen declares his opinion is based on: (1) the August 20, 2015 death certificate; (2) the August 17, 2015 medical examiner's report; and (3) unidentified "[m]edical records produced in this litigation." The entirety of the opinions expressed in his declaration are: (1) the manner of death was by suicide; (2) the cause of death was "due to a mixed drug toxicity"; and (3) "[w]ith the information available and without [d]ecedent's body and/or tissue samples to dictate otherwise, [d]ecedent did not die due to the June 3, 2010 incident in Sausalito, California, wherein he claimed a vacuum hit him in the head." In other words, he states what is relatively easy to determine – that defendant died of suicide by drug overdose. What Dr. Cohen does not address, other than the cursory statement that decedent "did not die due to the June 3, 2010 incident," is the critical causation question of whether the accident resulted in an uncontrollable impulse to commit suicide.

"Although a trial court does not 'try' the case or weigh the evidence at summary judgment, it does consider the competency of evidence presented." (*Mackey, supra,* 31 Cal.App.5th at p. 656.) "The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 761.) " 'In examining the sufficiency of affidavits filed in connection with the [summary judgment] motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20.)

We find that the trial court did not properly consider the competency of Dr. Cohen's declaration as our review clearly shows the declaration: (1) fails to negate the element of causation because it does not address whether decedent's injuries proximately

caused a mental condition that resulted in an uncontrollable impulse to commit suicide; (2) is inadmissible because Dr. Cohen is not qualified to give an opinion regarding decedent's mental state; and (3) is inadmissible as conclusory.

a. Plaintiff Did not Waive her Objections to Dr. Cohen's Declaration

At the outset, we address Allied's contention that "[t]he failure on [plaintiff's] part to obtain rulings on these [evidentiary] objections means that they are *not* a proper subject for review on appeal." (Italics in original.)

Plaintiff did not file written evidentiary objections, but instead objected to the declaration of Dr. Cohen at the hearing on the motion for summary judgment on the grounds that: (1) "it is beyond the expertise of the expert based on Evidence Code 720, 801(b) and 802," explaining that "a pathologist cannot determine whether or not there was a mental condition proximately resulting in an uncontrollable impulse to commit suicide"; (2) "it is purely speculative, argumentative and conclusory"; (3) it is based on hearsay; and (4) Dr. Cohen relied on medical records that were not before the court, citing *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Counsel also reminded the trial court that the court's tentative ruling found the opinion of plaintiff's expert to be inadmissible because none of the medical records were attached to his declaration, which was also the case for Dr. Cohen's declaration. The trial court declined to rule on any of these objections because they were not in writing.

Oral objections to evidence made at the summary adjudication hearing are timely. (Civ. Proc. § 437c; subd. (d); *Reid*, *supra*, 50 Cal.4th at pp. 531–532.) As explained by the California Supreme Court in *Reid*, "[a]fter a party objects to evidence, the trial court must then rule on those objections. If the trial court fails to rule after a party has properly objected, the evidentiary objections are not deemed waived on appeal." (*Id*. at p. 517.)

b. Dr. Cohen's Declaration Fails to Negate the Element of Causation as it Does Not Address Whether Decedent's Injuries Proximately Caused a Mental Condition that Resulted in an Uncontrollable Impulse to Commit Suicide

Dr. Cohen opines that the manner of decedent's death was suicide, a matter that is not in dispute. Dr. Cohen does not address the salient causation issue at summary

judgment, namely whether decedent suffered from a "mental condition which resulted in an uncontrollable impulse to commit suicide" as a result of the 2010 accident. (*Grant, supra*, 81 Cal.App.3d at pp. 797–798.)

Defendants concede that plaintiff can demonstrate causation by showing that "[d]ecedent's 2015 suicide was brought on by an irresistible impulse" to commit suicide resulting from the 2010 accident. In addition, defendants admit that "Dr. Cohen did not offer psychiatric opinion testimony, he offered cause of death testimony . . . ." In fact, Dr. Cohen's declaration sheds no light on decedent's mental state and hence provides no support for defendants' contention that plaintiff cannot meet the element of causation under the standard set forth in *Grant*. (*Grant, supra*, 81 Cal.App.3d at pp. 797–798.)

Dr. Cohen formed his opinions based upon the death certificate, medical examiner's report, and "[m]edical records produced in the litigation." He states that "[t]hese are the types of records I rely upon in forming my opinions in determining manner and cause of death when I am unable to perform an independent autopsy of a deceased." While Dr. Cohen summarizes both the medical examiner's report and death certificate, neither of which analyze decedent's mental state or anything about the 2010 accident, nowhere in the two-page declaration does Dr. Cohen ever specifically refer to, describe, or summarize the "[m]edical records produced in this litigation" upon which he bases any opinion. Clearly, his opinion goes to the manner of death – ingestion of a lethal amount of pain medications – and not to whether decedent's mental state caused his suicide.

The only opinion offered by Dr. Cohen beyond the conclusion that the manner of death was suicide is that "[w]ith the information available and without [d]ecedent's body and/or tissue samples to dictate otherwise, [d]ecedent did not die due to the June 3, 2010 incident in Sausalito, California, wherein he claimed a vacuum hit him on the head." It is difficult to understand how tissue samples in 2015 could shed light on whether the 2010 accident led to an uncontrollable impulse to commit suicide. In any event, as Dr. Cohen does not offer an opinion as to whether decedent suffered from a mental condition that would result in an uncontrollable impulse to commit suicide, defendants cannot meet

their initial burden on summary judgment based upon his declaration. (*Grant, supra*, 81 Cal.App.3d at pp. 797–798.)

c. Dr. Cohen is Not Qualified to Opine Regarding Decedent's Mental State

If Dr. Cohen's declaration were viewed as an attempt to demonstrate that the 2010 accident was not a proximate cause of decedent's death, it would be inadmissible as Dr. Cohen is not qualified to give an opinion regarding decedent's mental state.

Declarations provided in support of motion for summary judgment "shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., § 437c, subd. (d).) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) " '[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would likely to assist the jury in the search for truth, and no hard and fast rule can be laid down which would be applicable in every circumstance.' " (*ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 294.) Further, an expert's opinion must be based on the type of information on which an expert may reasonably rely and that information must support the reasons for the expert's opinion and cannot be based on speculation. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771–772); see also *People v. Viera* (2005) 35 Cal.4th 264, 292 [court upheld the trial court's exclusion of expert testimony on defendant's mental state by a former sheriff's detective who specialized in the study of cults but "was not a psychologist or a psychiatrist," explaining that the expert was not "qualified to testify generally about the relationship between mental illness and certain types of behavior"]); *People v. Davis*, 62 Cal.2d 791, 801 [not "all psychologists are competent to give an expert opinion on sanity . . . [a] certain level of training and experience is also necessary . . . ."])

Dr. Cohen is a forensic pathologist and his declaration does not indicate any psychiatric training, background, experience or degree; nor does it contain any indication of expertise regarding head trauma and psychiatric sequela. Defendants fail to provide any authority for the proposition that Dr. Cohen was qualified to opine on whether the 2010 injuries were the proximate case for decedent's suicide. Further, Dr. Cohen's declaration provided no basis for the trial court to find him qualified to provide expert testimony regarding whether the 2010 accident caused a "mental condition" that resulted in decedent having an irresistible impulse to commit suicide.

Thus, the cursory statement that "[d]ecedent did not die due to the June 3, 2010 incident," if read to address decedent's psychological state due to the 2010 accident, is inadmissible as Dr. Cohen is not qualified to offer such an opinion.

d. Dr. Cohen's Declaration is Inadmissible Because it is Conclusory

To be admissible, an expert's opinion "must not be based on assumptions of fact without evidentiary support or be purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion." (*Sanchez v. Kern Medical Transportation Corp*. (2017) 8 Cal.App.5th 146, 166 (*Kern Medical*); see also *Property California SCJLW One Corp v. Leamy* (2018) 25 Cal.App.5th 1155, 1163 [" 'An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury by *declaring* what occurred.' (Italics in original)"].) "[D]eclarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26; see also *Sesma v. Cueto* (1982) 129 Cal.App.3d 108, 113 [court reversed summary judgment on wrongful death and emotional distress causes of action, holding that "[f]acts set forth to support a grant of summary judgment must be evidentiary in quality. [Citation.] Conclusory affidavits are insufficient for this purpose"].)

Dr. Cohen's declaration, which is two pages long, states that he reviewed decedent's death certificate, the county medical report, and unidentified "[m]edical records produced in this litigation of [decedent]." The declaration provides no

description of the medical records beyond this single sentence. The referenced "medical records" are not attached to the declaration or otherwise produced, nor are they incorporated by reference to an exhibit or another pleading. Although Dr. Cohen briefly summarizes the certificate of death and the medical examiner report, he does not summarize the "medical records" in any way. Further, the only opinion in the declaration that goes beyond the immediate manner of death is that "[w]ith the information available and without Decedent's body and/or tissue samples to dictate otherwise, [d]ecedent did not die due to the June 3, 2010 incident in Sausalito, California wherein he claimed a vacuum hit him in the head."

We find that the declaration is inadmissible insofar as it offers opinions beyond the immediate cause of death – suicide by pill overdose – because it states a conclusory opinion without "a reasoned explanation connecting the factual predicates to the ultimate conclusion." (*Kern Medical*, *supra*, 8 Cal.App.5th at p. 166.) Further, the assumptions of fact made in the declaration are made without evidentiary support, as it does not specify or attach the medical records that Dr. Cohen relied on beyond the conclusory statement that he reviewed "[m]edical records produced in this litigation." (See *Garibay v. Hemmat*, (2008) 161 Cal.App.4th 735, 742 (*Garibay*) [defendant failed to shift burden to plaintiff on summary judgment where defendant's expert declaration did not attached medical records and thus "had no evidentiary basis"].)

C. Dr. Sadhai's Testimony Cannot Shift the Burden to Plaintiff

The second piece of evidence offered by defendants consists of limited and ultimately inconclusive excerpts from the deposition of neuropsychologist Dr. Sadhai. Dr. Sadhai was retained by decedent in April 2015 to conduct an evaluation related to the instant litigation. She saw him a total of three times in April and May 2015 related to the preparation of her evaluation, found decedent had some cognitive impairments, recommended treatment for these impairments, did not know whether he ever sought or obtained treatment, and never saw him thereafter. Further, she did not know whether he received any therapy and was not informed when he committed suicide.

Defendants submitted excerpts from Dr. Sadhai's deposition with their moving papers regarding her evaluation of decedent, that she did not observe warning signs that he would commit suicide, and that she "can't say definitely one hundred percent" that the 2010 accident caused his suicide. When asked "the reality here is that you really don't know why [decedent] committed suicide; isn't that true," Dr. Sadhai responded "I mean, again, I wasn't there, I don't have his medical record, I didn't speak to him, so yes, there is a certain . . . certainty that I don't know a hundred percent why he committed suicide." When asked if she knew "50 percent plus one feather," Dr. Sadhai responded no.

Plaintiff submitted Dr. Sadhai's entire deposition in support of her opposition to the summary judgment motions. Dr. Sadhai opined that decedent committed suicide as a result of the pain he was in from his 2010 injuries. When asked, based on her training, experience, and evaluation of decedent, whether she "believe[ed] that to a reasonable degree of neuropsychological probability that [decedent] committed suicide due to the injuries he sustained in the [2010 accident]," Dr. Sadhai replied that "[a]s far as in my opinion, I believe that he was in a lot of pain and from the injuries that he sustained, and I believe that was the reason why he committed suicide." Dr. Sadhai testified that she had not reviewed all of decedent's medical records and offered no opinion regarding decedent's mental state before the 2010 accident versus after the accident.

Dr. Sadhai's inconclusive testimony falls far short of demonstrating that no reasonable jury could find that decedent's 2010 injuries caused him to suffer from a "mental condition which resulted in an uncontrollable impulse to commit suicide." (*Grant, supra,* 81 Cal.App.3d at 797–798.) Thus, defendants failed to meet their burden of negating the element of causation on plaintiff's wrongful death claims based upon Dr. Sadhai's testimony.

D. Conclusion

Defendants did not meet their burden of demonstrating that no triable issues of material fact exists in regards to the causation element of the wrongful death causes of action. Therefore, the burden never shifted to plaintiff and we do not reach the trial court's exclusion of the declaration of plaintiff's expert Dr. John Chamberlain because it

relied on medical records that were not properly authenticated, citing *Sanchez*, *supra*, 63 Cal.4th 655. We note that despite excluding Dr. Chamberlain's declaration, the trial court did not rule on plaintiff's objections to Dr. Cohen's declaration on the basis that it simply refers to "medical records" produced in the litigation without identifying those records, let alone authenticating them. (See *Garibay*, *supra*, 161 Cal.App.4th at p. 742 ["[a]lthough hospital and medical records are hearsay, they can be admitted under the business records exception to the hearsay rule. [Citation] Such records, however, must be properly authenticated"].) Presumably, the trial court will have the opportunity to consider in full and on their merits the parties' arguments raised pursuant to *Sanchez* prior to trial.

DISPOSITION

The petition is granted. Let a writ of mandate issue directing the trial court to set aside its order granting summary adjudication of plaintiff's wrongful death causes of action in its entirety, and to enter an order denying the motion of respondents for summary adjudication as to the wrongful death causes of action. Costs are awarded to plaintiff.

_____
Petrou, J.

WE CONCUR:

_____
Siggins, P. J.

_____
Fujisaki, J.